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No. 622.

U.S. - Supreme Court, U. S.

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IN THE

# Supreme Court of the United States

October Term, 1947.

**WESTERN UNION TELEGRAPH COM-  
PANY, - - - - -**

**Petitioner,**

**versus**

**WILLIAM R. McCOMB, Administrator of  
the Wage and Hour Division, United  
States Department of Labor, - -**

**Respondent.**

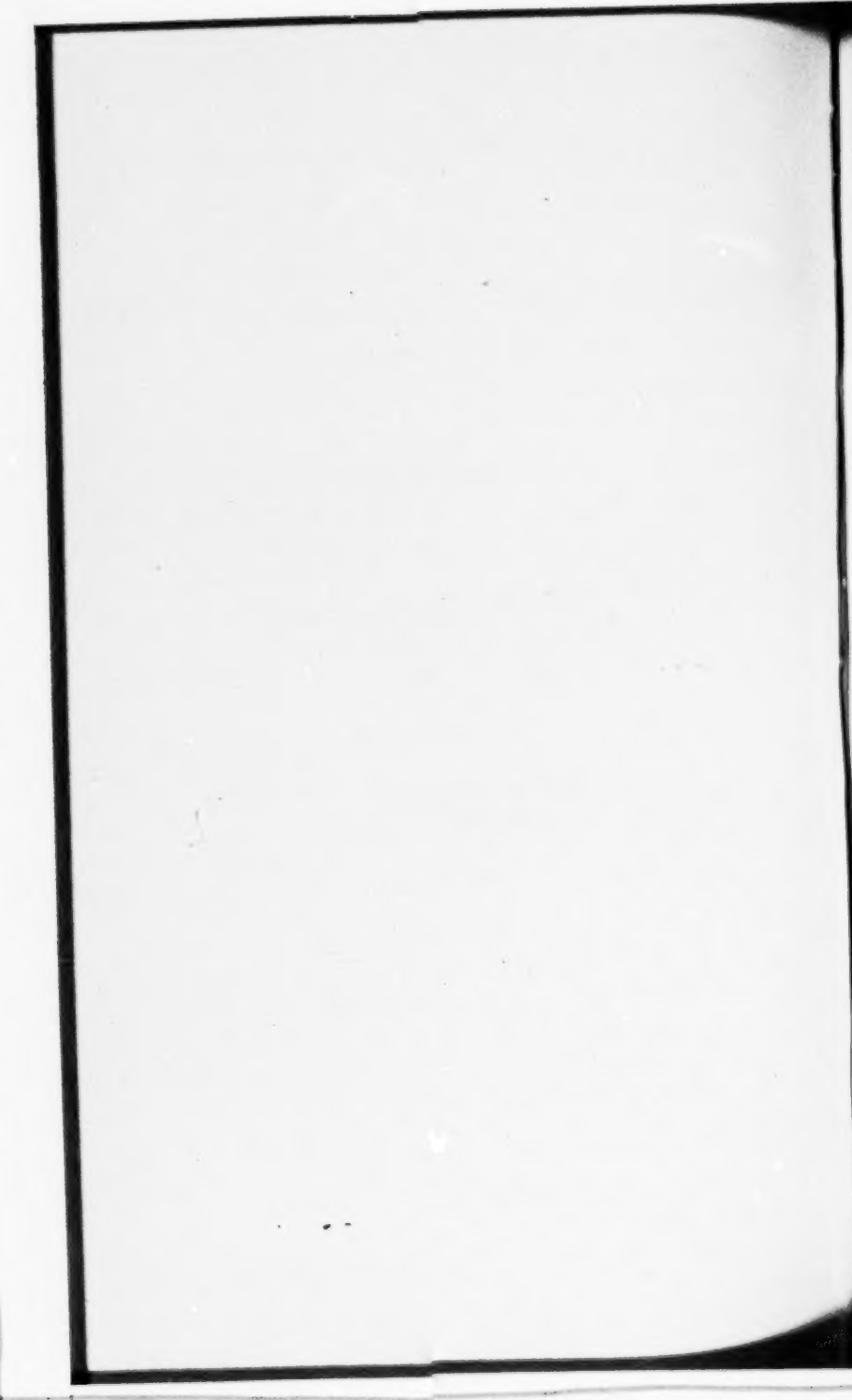
## PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

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April 13, 1948.



IN THE  
**Supreme Court of the United States**

October Term, 1947.

No. 622.

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WESTERN UNION TELEGRAPH COMPANY, - *Petitioner,*

*v.*

WILLIAM R. McCOMB, ADMINISTRATOR OF  
THE WAGE AND HOUR DIVISION, UNITED  
STATES DEPARTMENT OF LABOR, - *Respondent.*

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**PETITION FOR REHEARING.**

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*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The Telegraph Company realizes that the odds are against a petition for rehearing on a petition for a writ of certiorari. However, such petitions for rehearing have been granted by this Court.<sup>1</sup>

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<sup>1</sup>Robinson v. United States, certiorari denied 324 U. S. 789, rehearing granted and certiorari granted 324 U. S. 808; Zap v. United States, certiorari denied 326 U. S. 777, rehearing granted and certiorari granted 326 U. S. 802; Gardner, Trustee v. New Jersey, certiorari denied 328 U. S. 850, rehearing granted and certiorari granted 328 U. S. 876; Hickman v. Taylor, certiorari denied 327 U. S. 808, rehearing granted and

(Footnote continued on following page.)

A decision by this Court on the question of whether or not the Telegraph Company can employ "independent contractors" in small towns where there is not enough telegraph business to warrant a Company office is of importance not only to the Telegraph Company but also to such small towns throughout the country. It will determine whether or not such small towns can continue to have the benefit of efficient nation-wide telegraph service.

With reference to the effect on the Telegraph Company of the competition of long distance telephone and air mail the Federal Communications Commission, in June, 1946, Docket No. 7445 (R. 817), in granting the Telegraph Company a rate increase, said:

(R. 819) "Another important factor which leads us to the conclusion that Western Union is definitely erring on the side of optimism in its 6 per cent estimate is the factor of *competition*<sup>2</sup> from other communication services. Telephone toll and teletypewriter exchange facilities and services are rapidly being improved and expanded, and substantial reductions in rates for these services have only recently been made. \* \* \*"

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certiorari granted 328 U. S. 876; 149 Madison Avenue Corp. v. Asselta, certiorari denied 329 U. S. 764, rehearing granted and certiorari granted 329 U. S. 817; Silesian American Corp. v. Markham, certiorari denied 329 U. S. 730, rehearing granted and certiorari granted 330 U. S. 852; Sioux Tribe of Indians v. United States, certiorari denied 329 U. S. 758, rehearing granted, order denying certiorari vacated, judgment vacated and case remanded 329 U. S. 684; Interstate Natural Gas Co., Inc. v. Federal Power Commission, certiorari denied 329 U. S. 802, rehearing granted and certiorari granted 330 U. S. 852; Alaska Juneau Gold Mining Co. v. Robertson, certiorari denied 331 U. S. 825, rehearing granted and certiorari granted 331 U. S. 793, Judgment of reversal of CCA modified to provide that on remand to the district court that court shall have authority to consider any matters presented to it under the Portal-to-Portal Act of 1947; Estin v. Estin, certiorari denied 332 U. S. 760, rehearing granted and certiorari granted 332 U. S. 840.

<sup>2</sup>Italics ours throughout.

(R. 820) "The air mail service, which is *another main competitor* of Western Union, is also being speedily improved. \* \* \*"

With reference to economies practiced by the Telegraph Company, the Federal Commission said:

(R. 820) "According to the testimony, Western Union is presently engaged in a strict economy program, in an attempt to cut costs. There are definite limits to such a program, however, because of the need of meeting service demands. There were indications in the record that service is already beginning to suffer from the economies that have been imposed."

In showing that rate increases are not the answer, the Federal Commission said:

(R. 822) "\* \* \* Moreover, as has been suggested, even if the rate relief sought herein is granted, the financial emergency now facing Western Union may soon recur, and in that event, further rate increases presumably will offer no solution, but may only intensify the company's difficulties, in view of its need to meet the rate and service competition of other means of rapid communication. \* \* \*"

As to the Telegraph Company's nation-wide services and the need for such services, the Commission said:

(R. 822) "We may summarize very simply our findings on Western Union's revenue needs: We are of the opinion that Western Union will need substantially more revenue than it is now

requesting if it is to continue in operation as a solvent enterprise, and provide satisfactory service on a comprehensive Nation-wide basis.”

\* \* \* \* \*

(R. 823) “If there is a real need in this country for the service which the Western Union can provide, something more basic must be done, and done soon, to meet the problem of developing a strong and efficient domestic telegraph system in the United States.”

Our reason for making the above quotations is to point out that air mail and long distance telephone competition has so reduced the telegraph business that unless the Telegraph Company can use “independent contractors” in small towns it cannot continue to furnish satisfactory telegraph service to such small towns.

Congress did not intend to prevent the use of “independent contractors” employed in “normal business relationships.”

*United States v. Silk*, 331 U. S. 704.

(P. 714) “\* \* \* There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. \* \* \*”

Take Georgetown,<sup>3</sup> Kentucky, as a sample, because the persons involved are few, the facts are simple and there has never been a hint that any of the mistakes emphasized in the opinion of the court below (R. 1217, footnote) had ever happened at Georgetown:

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<sup>3</sup>The second Kentucky town named in the injunction (R. 88).

The total of incoming and outgoing telegrams at Georgetown is only about 37 or 38 per day (R. 680). The gross revenue from telegraph business at Georgetown is only about \$15.00 per day (R. 681). Obviously, with so little telegraph business at Georgetown, the Company cannot have its own office with the attendant expenses of rent, light, heat, water, wages, telephone, janitor service, etc.

The only way Georgetown, Kentucky, can have efficient telegraph service is for the Company to obtain "the services of another to perform a portion of production or (and)<sup>4</sup> distribution."

In October, 1942, the Telegraph Company contracted with Mr. L. S. O'Dell as its 9-A agent at Georgetown under a written contract which is still in effect (R. 1163). Previous to that time, a drug store had been the 9-A agent (R. 1163).

Since 1925, Mr. O'Dell has been sales agent for Buick and Pontiac cars and G.M.C. trucks; he owned a garage (R. 1163) and was ticket agent for the Greyhound Bus Lines (R. 1173); he also owned a soft drink, candy, ice cream and cigarette business (R. 1165) such as is usually found at bus stations. The telegraph, bus and confectionery businesses are all conducted at two adjoining counters in one side of the automobile showroom (R. 678-679).

Previous to the time the Telegraph Company made the 9-A agency contract with Mr. O'Dell, a Miss Green had been attending to the bus agency and confectionery counter. These took only a part of her time so

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<sup>4</sup>Parenthesis supplied.

that she was able to take on the main part of the telegraph work. When Miss Green is out for lunch or downtown or on vacation, a bookkeeper (Miss Inman) from the garage takes over the telegraph, bus ticket and confectionery work (R. 683).

Miss Green (R. 683) and Mr. O'Dell (R. 1165) both said that he attended to the telegraph, bus and confectionery business "before she gets there in the morning or after she leaves at night" and also that he attended to these three businesses every other Sunday (R. 1165).

The gross revenue from the bus business is approximately \$1,000.00 in each eight-day period (R. 699) or about \$125.00 per day. The gross revenue from the confectionery is \$12.00 to \$15.00 per day (R. 679) and from the telegraph business about \$15.00 per day.

As has been shown, Miss Green was working for Mr. O'Dell when the 9-A agency contract was signed. Her hours per day and per week were substantially the same ever since she started work for Mr. O'Dell (R. 674). Both Miss Green and Mr. O'Dell testified that the Telegraph Company had nothing to do with her having been employed, nothing to do with fixing her hours of work or her compensation or her vacation, etc. All of these matters were done by Mr. O'Dell personally. Miss Green kept no records or forms for the Telegraph Company except the original of outgoing messages (R. 701).

She was told at the beginning "that if at any time I had any trouble that the Lexington operators were



always willing to help" (R. 677). Miss Green has read the rules in the tariff book only twice in four years. No Western Union representative ever told her she had to conform to the rules nor has she ever been given any test of any kind to see whether she was familiar with all of the rules (R. 682). She has never been reprimanded, disciplined or penalized in any way for being unfamiliar with the Company rules (R. 683). When visits were made to Georgetown by representatives of the Telegraph Company, the conversation was whether or not she was getting along all right and if she had any questions (R. 684-685). She reads the circulars from the Telegraph Company only if they "look interesting" (R. 686).

There is a separate cash drawer for bus tickets and telegrams. Miss Green is paid from the bus cash drawer because it started that way before Mr. O'Dell became the Telegraph Company agent (R. 697). She has never been paid by the Telegraph Company. The money from the telegraph business is deposited in the "O'Dell Agency" account in the bank (R. 677). The Telegraph Company has no control over this bank account and no way of withdrawing any deposit in that account (R. 691).

We started to copy all of the testimony of Miss Green, who was put on the stand by the Administrator, and the testimony of Mr. O'Dell, a witness for the Company, and file it as an appendix to this petition, but decided against such an idea. The testimony is not long (Miss Green, R. 673-719; Mr. O'Dell, R. 1162-1169). The Court is respectfully requested to glance through it. It was a perfect independent contractor

relationship within all of the cases on the subject by this Court.

The order in this case (R. 88-89) enjoins the Telegraph Company at Georgetown from suffering or permitting Mr. O'Dell, Miss Green and Miss Inman<sup>5</sup> "to be employed in the operation or for the purpose of operating defendant's facilities or equipment used in carrying on its telegraph business" unless each of them "receive wages for the time required to be present and available for such service as well as actually engaged therein at rates less than \* \* \*" the minimums fixed by the Fair Labor Standards Act. The injunction also provides the same for overtime and for the keeping of time records at Georgetown by the Telegraph Company.

In other words, the lower court held that Mr. O'Dell, Miss Green and Miss Inman were employees of the Telegraph Company and not independent contractors.

This means that if Georgetown is to continue to receive efficient telegraph service, the Telegraph Company must itself pay or require Mr. O'Dell to pay Miss Green, Miss Inman and himself the minimum in the Act for the time they are selling bus tickets or waiting on the confectionery counter customers as well as for the time they are actually doing telegraph work.

It is impossible to see how the order of the lower court can be obeyed as to Mr. O'Dell. He does not receive wages in any sense of the word. His income depends upon the net income from his automobile and truck sales agency, garage, bus ticket, telegraph and

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<sup>5</sup>Not by name, of course.

confectionery work. He either makes profits or sustains losses from the net result of the combination of all of his various businesses, which can only be ascertained at the end of any fiscal period.

The judgment of the lower court ignores the realities of the situation. Mr. O'Dell, to say the least, is a "small businessman" (331 U. S. 704, 719). He is a successful one and it is unrealistic for the judgment herein to hold that he is in any sense an employee of the Telegraph Company.

While a few mistakes were made in the early stages at three towns, it cannot be successfully denied that at the time of the trial each of the other seven towns in Kentucky named in the judgment had clearly bona fide independent contractors.

The question therefore narrows down to whether or not the Telegraph Company can use "independent contractors" for a part of its business in order to serve small communities where the revenue would not support a Company office.

WHEREFORE, we respectfully ask that the petition for writ of certiorari be granted.

Respectfully submitted,

CHARLES W. MILNER,  
HUBERT T. WILLIS,  
B. HUDSON MILNER,  
*Attorneys for Petitioner.*

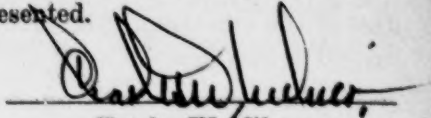
JOHN H. WATERS,  
BULLITT & MIDDLETON,  
*Of Counsel.*

April 13, 1948.

*Certified True*

**Certificate.**

I hereby certify that the foregoing petition is presented in good faith and not for delay and that the petition is restricted to substantial grounds available to petitioner although not previously presented.

A handwritten signature in dark ink, appearing to read 'Charles W. Milner', is written over a horizontal line. The signature is stylized with large, sweeping loops.

Charles W. Milner.